In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 720

IN THE MATTER OF THE PETITION OF EASTERN AIR LINES, INC.

NORTHEAST AIRLINES, INC.

v.

CIVIL AERONAUTICS BOARD

No. 766

IN THE MATTER OF THE PETITION OF NATIONAL AIRLINES, INC.

NORTHEAST AIRLINES, INC.

v.

CIVIL AERONAUTICS BOARD

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD

1. In the government's view, petitioners Eastern Air Lines and National Airlines were entitled to intervene in the proceedings pending below—proceedings brought by Northeast Airlines for review of a Board order denying the application of Northeast for

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renewed authority to operate south of New York to Miami and other points. As carriers operating between the same points and hence competitively affected, the petitioners were authorized to intervene in opposition to the Northeast renewal application before the Board (as they did); and unquestionably they would have had standing to obtain judicial review of any grant of the Northeast application.[1] If the court of appeals should set aside the Board's order, petitioners again would be entitled to participate in the further proceedings before the Board and to obtain judicial review of any Board action inimical to their competitive interests. Also, if the Board's order should be affirmed on review and if Northeast should continue to conduct operations in the absence of a certificate from the Board, petitioners would have standing (as would the Board) to obtain injunctive relief against such operations. Federal Aviation Act, Section 1007.[2]

In these circumstances, we think that petitioners have a sufficient interest in the review proceeding to

[1] Section 1006 of the Federal Aviation Act (72 Stat. 795, 49 U.S.C. 1486) confers standing to obtain review upon a person "disclosing a substantial interest in" the Board order involved. A competitor has a "substantial interest" which entitles it to intervene before the Board to obtain review of an adverse Board order. See, *e.g.*, *Seaboard & Western Airlines v. Civil Aeronautics Board*, 181 F. 2d 515; cf. *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470.

[2] Section 1007 (72 Stat. 796, 49 U.S.C. 1487) authorizes a district court to enjoin violations of the Act on application of the Board or "in the case of a violation of Section 401(a) of this Act [the prohibition against operations without a certificate from the Board], any party in interest * * *."

intervene in defense of the Board's order. They will be bound by that judgment in the sense that they will have no recourse from such consequences as it may have upon their competitive interests. Although the Board is defending its order, petitioners correctly point out that a person entitled to intervene is also entitled to speak through his own counsel.[3] And while the court of appeals may well permit petitioners to participate, as *amici curiae,* to the same extent as they would as intervenors, that fact does not warrant a denial of intervention. Cf. *Federal Communications Comm'n* v. *N.B.C.,* 319 U.S. 239, 246. Thus, participation as *amici* would not authorize Eastern and National to seek this Court's review of a decision on the merits adverse to their contentions.

2. We also agree with petitioners' claim that the court of appeals lacks authority under either Section 1006(d) of the Federal Aviation Act or Section 10(d) of the Administrative Procedure Act to stay the effectiveness of the Board's denial of the Northeast renewal application beyond the conclusion of the proceedings for judicial review; it would seem that such a stay would constitute a judicial grant of a license denied by the Board. See *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U.S. 4, 14; *Federal Power Commission* v. *Idaho Power Co.,* 344 U.S. 17.

[3] While petitioners suggest that the Board's order may not be fully defended because the Department of Justice was opposed to the Board's action, the fact is that the Attorney General has advised the Board to conduct, through its own legal staff, its defense of the merits of its order.

3. We suggest, however, that the Court may well conclude that neither of the issues noted above is of sufficient practical importance, in the present context of the case, to warrant consideration at this time, and that the petitions should accordingly be held in abeyance until it is ascertained whether the controversy will prove a live and significant one.

So far as the court of appeals' action in authorizing a stay to a day certain (April 30, 1964) is concerned, there appears to be no likelihood that this will permit Northeast to operate beyond the period of judicial review; the case will not be argued in the court of appeals before March. And since the court of appeals doubtless has power to issue a stay *pendente lite* (and, beyond that, pending the filing and disposition of a petition for certiorari in this Court), the matter is not one of any apparent moment.

As to the intervention issue, we perceive no prospect of irremediable injury if the Court refrains from considering that question at this time. Indeed, separate and plenary review of this issue now would seemingly make for delay rather than for expedition.

Respectfully submitted:

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Acting Solicitor General.[*]

JOHN H. WANNER,
General Counsel,
Civil Aeronautics Board.

JANUARY 1964.

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[*] In lieu of the Solicitor General, who has disqualified himself for personal reasons.